No. __

IN THE
Supreme Court of the United States

October 2007 Term

DENVER MONTGOMERY JACKSON,

PETITIONER

versus

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a COA was improperly denied where a Sixth and Fifth Amendment issue was properly raised and preserved at sentencing, but the case was not on direct appeal at the time of *United States v. Booker*, 543 U.S. 220 (2005) (petitioner's direct appeal had already been decided *pre Booker* and *Blakely v. Washington*, 542 U.S. 296 124 S.Ct. 2531,159 L.Ed.2d 403 (2004)) and is the petitioner entitled to relief under *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215 (1999), under the United States Constitution, under fundamental fairness and accuracy of the criminal proceeding, and under all the principles of our judicial system that apply to properly preserved Sixth and Fifth Amendment objections and that apply to the spirit of our law.

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ORDER AND JUDGMENTBELOW

The Order of the United States Court of Appeals for the Fifth Circuit was rendered on December 11, 2006 and is unreported. The Order is attached to this Petition as Appendix "C." The Judgment by the district court denying Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is attached as Appendix "A." The denial of the Certificate of Appealability by the district court is attached as Appendix "B".

JURISDICTION

The Order of the United States Court of Appeals for the Fifth Circuit was entered on December 11, 2006. The Jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend V:

The Fifth Amendment to the United States Constitution provides in relevant part that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor shall any person...be deprived of life, liberty, or property, without due process of law..."

U.S. Const. amend VI:

The Sixth Amendment to the United States Constitution provides in relevant part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

CONCISE STATEMENT OF THE CASE

Mr. Jackson was tried before a jury in the United States District Court for the Western District of Texas, Waco Division, and was convicted of conspiracy to distribute methamphetamine and for conspiracy to manufacture methamphetamine (Counts 1 and 4) and carrying a firearm during the commission of a drug trafficking crime (Count 2). Mr. Jackson received 188 months on Counts 1 and 4, to run concurrently and was sentenced to 60 months for count 2, to be served consecutively to the other two convictions.

Mr. Jackson was sentenced on October 8, 2002. At Mr. Jackson's sentencing, the trial court stated the punishment mandated by the guidelines was excessive and was a terrible method of dispensing justice in criminal cases. Also at the sentencing, Mr. Jackson's trial attorney objected to the drug amounts and argued no quantity was alleged in the indictment. The facts supporting Mr. Jackson's sentences for the drug convictions were judge found facts and were not admitted by Mr. Jackson nor found by a jury beyond a reasonable doubt and therefore violated Mr. Jackson's right to jury trial.

Mr. Jackson subsequently appealed his convictions to the Fifth Circuit Court of Appeals, CCA #02-51101. The conviction and sentence was affirmed on August 11, 2003. In his direct appeal, Mr. Jackson's appellate attorneys did not raise as an issue in the brief of appellant the sentencing issue which is the subject of this petition, i.e., the unconstitutional enhancements found at sentencing by the trial court.

Approximately 10 months after Mr. Jackson's direct appeal in August, 2003, wherein his convictions and sentences were affirmed, this Honorable Court decided *Blakely* in June, 2004 and several months later, *Booker* in January, 2005. Based on preserving the Sixth Amendment unconstitutional enhancement of sentence issue raised at his sentencing (after

the decisions in *Blakely* and *Booker)*, Mr. Jackson filed his 28 U.S.C. Section 2255 Motion to Vacate, Set Aside, or Correct Sentence.

Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody pursuant 28 U.S.C § 2255 Proceedings

On June 24, 2005, Petitioner filed in the United States District Court for the Western District of Texas, Waco Div, a Motion to Vacate Set Aside, Or Correct Sentence by a Person in Federal Custody pursuant 28 U.S.C. § 2255. Shortly after, Petitioner filed a Memorandum in Support of the motion to vacate.

At sentencing, and as stated herein, Petitioner had objected to the enhanced sentences based on judge found facts stating there was no quantity of amphetamine alleged in the indictment. The sentencing judge then voiced his extreme displeasure over the application of the guidelines in Petitioner Jackson's case and in sum, stated that if he had the discretion, he would not have followed the guidelines and would have sentenced petitioner to less time.

After *Booker* was decided, Petitioner filed his motion to vacate and within the motion to vacate, he asserted his motion was brought under 28 U.S.C. § 2255 Part VI(3), which provided the one year statute of limitations did not bar Petitioner's motion to vacate because January 12, 2005, was the relevant date in question since it was the date the right asserted was initially recognized by the Supreme Court with the *Booker* decision.

In support of Petitioner's motion to vacate, he attached excerpts of the sentencing court's recitation on the record at sentencing of his extreme displeasure over the application of the guidelines in petitioner's case and statements regarding if he had discretion, he would not have followed the guidelines and would have sentenced petitioner to less time.

Shortly after the motion to vacate was filed, the district court entered a Judgment in a Civil Case finding that petitioner's Motion to Vacate was denied because it was time barred (See Judgment, Appendix "A"). Petitioner then filed his Notice of Intent to Appeal. The district court then filed a Certificate of Appealability ordering that the Certificate of Appealability be denied on September 26, 2005.

A Motion and Brief in Support of Certificate of Appealability was filed in the Fifth Circuit Court of Appeals. On December 11, 2006, the United States Court of Appeals for the Fifth Circuit found that Mr. Jackson had failed to make the showing necessary to obtain a COA and therefore denied the motion.

Petitioner Jackson submits the Fifth Circuit's order denying his COA was incorrect because the court's decision was in clear violation of U.S. Supreme Court authority and the Fifth and Sixth Amendments of the United States Constitution.

STATEMENT

This case involves whether a COA should have been granted after the court of appeals denied the appeal of a motion to vacate pursuant 28 U.S.C. § 2255 that contained the issue of a properly preserved district court objection to the Fifth and Sixth Amendment rights to have a jury determine facts that increased petitioner's sentence prior to the *Blakely/Booker* era.[1]

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[1] The issue was raised and preserved at sentencing but was not raised on direct appeal. The direct appeal was decided on August 11, 2003, by the Fifth Circuit Court of Appeals, well before *Blakely* and *Booker* was decided. No petition for writ of certiorari was filed following Petitioner's direct appeal.

These constitutional rights were never waived by petitioner and were in fact raised by petitioner at sentencing. Further, as evidence of undue prejudice suffered by petitioner and the lack of harmlessness, at petitioner's sentencing, the court stated on the record he abhorred the fact he did not have discretion. The sentencing court also stated the guideline sentencing scheme mandated in the case was excessive.

Since the time petitioner preserved this issue at the district court, this Honorable Court has decided the exact Sixth Amendment issue of unconstitutional sentencing enhancements presented at sentencings in *Blakely v. Washington*, 542 U.S. 296, 304-305, *Booker*, and most recently, *Cunningham v. California*, ___ U.S. ____ (2007).

Petitioner submits that when a Sixth and Fifth Amendment issue is properly raised and preserved at sentencing but the case was not on direct appeal at the time *Booker* was decided (because petitioner's direct appeal had already been decided *pre Booker* and *Blakely*),the defendant must be entitled to relief under *Jones, infra*, under the United States Constitution, under the fundamental fairness and accuracy of the criminal proceeding, and under all the principles of our judicial system that apply to properly preserved Sixth and Fifth Amendment objections and that apply to the spirit of our law.

This writ should be granted because this issue is of paramount importance to all those defendants who, *pre Booker* and *pre Blakely*, raised and preserved Sixth and Fifth Amendment objections to increased sentences without a jury determination of the facts related to the enhancements.

In denying Petitioner's COA, the Fifth Circuit Court of Appeals has ignored this Honorable Court's holdings in *Jones, Blakely*, and *Booker* by finding Mr. Jackson failed to make the showing necessary to obtain a COA. It was error and incorrect for the court of appeals to find petitioner's

constitutional objections set forth herein failed to show that at least jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Accordingly, this petition for writ of certiorari should be granted.

REASONS FOR GRANTING THE PETITION

Petitioner seeks certiorari because of the gravity of the question presented and the affect this Court's decision will have upon those in alike circumstances throughout the United States. This Honorable Court's decision will also affect all defendants that properly raised and preserved a constitutional due process issue in the sentencing court but which was not recognized as unconstitutional until after that defendant-appellant's direct appeal was over. This Honorable Court has not previously addressed the issue framed herein.

The court of appeals incorrectly found Mr. Jackson failed to make the showing necessary to obtain a COA, that at least jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The district court and the court of appeals' decisions regarding Mr. Jackson and his sentence gravely undermines the entire judicial process. Clearly, jurists would find it debatable whether the petition stated a valid claim of the denial of a constitutional right, due process in the case herein, and reasonable jurists would find it debatable whether the district court was correct in its procedural ruling- particularly in light of the fact the district court judge told Mr. Jackson his case was one of those cases which the judge abhorred the fact he didn't have any discretion and that the mandated sentencing scheme in his case was excessive. At sentencing,

Mr. Jackson raised and preserved the issue of wrongly having his sentence increased solely on judge found facts.

The case herein cries out for justice and the fulfillment by the district court judge's of his own statements in open court that the sentencing guideline range in Mr. Jackson's case was excessive but mandated, and that the judge abhorred the fact he didn't have any discretion. When the motion to vacate was filed and presented to the very same judge, he declined to fulfill his pronouncements in open court and his promise to help Mr. Jackson. Mr. Jackson believes any impartial and reasonable jurist would find that based upon the judge's actions and pronouncements, the COA should have been granted.

After *Blakely* and *Booker*, the judge did have the discretion he had proclaimed to desire, but yet in spite of that proclaimed desire, the judge declined to sentence Mr. Jackson to a lesser term of imprisonment. Mr. Jackson raised and preserved his objection to an enhanced term of imprisonment based on judge found facts. Jury determination had not been waived by Mr. Jackson. *Jones, supra; see also McMillan v. Pennsylvania,* 1477 U.S. 79 (1986). Mr. Jackson's sentence was increased by judge found facts in violation of the Sixth Amendment's notice and jury trial guarantees and in violation of the Fifth Amendment Due Process Clause. The court of appeals ignored these obvious violations of Mr. Jackson's constitutional rights and as a result, Mr. Jackson was harmed by being wrongly incarcerated to an increased sentence of imprisonment.

The court of appeals was incorrect in finding Mr. Jackson failed to make the showing necessary to obtain a COA, and therefore denied his COA motion, since Mr. Jackson showed in his application to obtain the COA the judge's own in court statements which evidence the district court was incorrect in its procedural ruling. The petition had clearly stated a valid claim because at trial,

Mr. Jackson's sentences for the two drug convictions were unconstitutionally increased based upon judge found facts and not based upon facts found by a jury beyond a reasonable doubt. There is no question the drug amounts attributed to Mr. Jackson by the court at sentencing which significantly increased his sentence were not found by the jury at his trial. At sentencing, trial counsel raised the issue there was no quantity of amphetamine [sic] alleged in the indictment. In fact, also during the sentencing, the prosecutor admitted the amounts of methamphetamine were not proved to the jury. Since the quantities were not alleged in the indictment, nor admitted by Mr. Jackson, nor found by a jury beyond a reasonable doubt, Mr. Jackson's sentence clearly is a violation of his Fifth and Sixth Amendment rights under the United States Constitution. See *Booker, supra.*

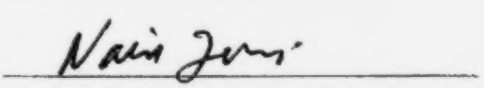
This Honorable Court on January 22, 2007, decided *Cunningham v. California,* and again reiterated the holdings of *Blakely* and *Booker,* and held the California determinate sentencing law, by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. Mr. Jackson asserts he properly preserved his rights under the Fifth and Sixth Amendments at the district court level, never waived those rights of having his sentence unconstitutionally increased, presented the unconstitutional increase to the district court again in his motion to vacate, and established beyond question that the denial of his constitutional right was not harmless because the judge stated very clearly that Mr. Jackson's sentence was harsh but that it was mandatory. Consequently, Mr. Jackson has shown the denial of a constitutional right and he was harmed by the denial. The

court of appeals was incorrect in finding Mr. Jackson did not make the showing necessary to obtain a COA. The law, justice, equity, and everything we hold dear and just in our judicial system requires the COA should have been issued and the court of appeals' judgment was error.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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Appendix

APPENDIX "A"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

DENVER MONTGOMERY JACKSON,

Plaintiff, **JUDGMENT IN A CIVIL CASE**

v. Case Number: W-01-CR-111(2)
W-05-CV-242

UNITED STATES OF AMERICA,

Defendants.

Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
That Movant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28:2255 is DENIED as time barred.

July 25, 2005

William G. Putnicki
Clerk

s/ original signed by clerk
(by Deputy Clerk)

APPENDIX "B"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

DENVER MONTGOMERY JACKSON, (filed 9/26/05)

Plaintiff,

v. Civil No.: W-05-CA-242
Criminal No.: W-01-CR-111(2)

UNITED STATES OF AMERICA,

Defendants.

CERTIFICATE OF APPEALABILITY

On this date the Court considers Movant's Notice of Appeal, filed September 20, 2005, from the Court's order, filed July 25, 2005, dismissing Movant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. Section 2255 as time barred. Pursuant to Fed. R. App. P. 22(b), the filing of Movant's notice of appeal requires the Court to either issue a certificate of appealability or state why a certificate of appealability should not issue. The Court, after considering the record in the case and the requirements of 28 U.S.C. Section 2253 and F.R.A.P. 22(b), hereby finds that a certificate of appealability should not issue. Based upon the Court's Order, filed July 25, 2005, dismissing the Section 2255 Motion and which is incorporated by reference as if fully set forth

herein, the Court finds Movant has failed to make a substantial showing of the denial of a constitutional right. Accordingly, it is

ORDERED that a Certificate of Appealability be and is hereby **DENIED**.

SIGNED this 26th day of September, 2005.

s/Walter S. Smith, Jr. (original signed
WALTER S. SMITH, JR.
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-51443
USDC No. 6:05-CV-242
USDC No. 6:01-CR-111-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DENVER MONTGOMERY JACKSON,

Defendant-Appellant.

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Appeal from the United States District Court
For the Western District of Texas

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O R D E R:

Denver Montgomery Jackson, federal prisoner # 15642-180, moves for a certificate of appealability (COA) to appeal from the denial of his 28 U.S.C. Section 2255 motion as time-barred. Jackson challenges his conviction of drug conspiracy and firearm offenses, and he contends that his Section 2255

motion was timely because it was filed within one year of the issuance of United States v. Booker, 543 U.S. 220 (2005).

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. Section 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). When a Section 2255 motion is dismissed on procedural grounds, a COA will issue only if the application "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Jackson has failed to make the showing necessary to obtain a COA; his COA motion is DENIED.

s/Carolyn Dineen King (original signed)
CAROLYN DINEEN KING
UNITED STATES CIRCUIT JUDGE

APPENDIX "D"

Excerpts from sentencing transcript –

(By the Court): Mr. Haynes, you and I could discuss publicly or privately for the rest of the morning horror stories that we have encountered involving the end result in cases mandated by the sentencing guidelines. I believed that the entire scheme was unconstitutional until the Supreme Court of the United States said otherwise. Therefore, I don't have any right to think otherwise at this point. It is, in my view, as I have stated privately and publicly, a terrible method of dispensing justice in cases where someone is accused of and found guilty of violating criminal law. It was, as you suggested, purportedly designed in large part to prevent discrepancy in sentencings, and to an extent at least that has happened, but Congress, in its zeal to be up front soldiers in the, quote, "drug war," has created a system that results in Draconian and somewhat unjust punishments in way too many cases. Congress is so distrustful of federal judges that it has quite intentionally by this scheme removed from federal judges the discretion that we used to have to formulate a punishment for an offense or offenses that we feel is just and reasonable. It is a rare situation where I am allowed to do that in this day and time. Congress not only gives law enforcement every tool in the world in order to place handcuffs on people who violate federal laws, it has placed handcuffs on federal judges, too, because they've created a system where if I continue to abide by the oath I took and follow the law, then I'm left with an extremely limited amount of discretion. **This is one of those cases where I abhor the fact that I don't have that discretion.** (Emphasis added).

Mr. Jackson has been found guilty of serious violations of federal law, but the punishment that Congress has, through its guideline sentencing scheme, mandated is in this case excessive, certainly under the guidelines as the matter stood after the jury reached its verdict. (S. Tr. 26-27).